2008 STATE BAR OF CALIFORNIA ENVIRONMENT SECTION
NEGOTIATION COMPETITION FACT PATTERN

Biomassive, Inc. is the largest agricultural enterprise in the western United States. Among its products are almonds, rice, and walnuts. Because of its long history in the agricultural industry, Biomassive considers itself a steward of the environment. Company officials routinely donate to environmental causes, and they are particularly fond of Waterfowl Forever.

In addition to producing agricultural products, Biomassive owns and operates three power plants in California. Biomassive's three power plants are steam boiler designs. Biomassive's boilers burn fuel in a cell to heat water in tubes to make steam. The steam passes through a turbine to generate electricity.

Biomassive fuels the cells in its boilers by burning its agricultural byproducts, including rice hulls, almond and walnut shells, lopped branches from its orchards, and wood from downed trees. Biomassive also burns various urban wood wastes, including construction debris. Some contractors deliver construction debris to Biomassive for free as an alternative to paying landfill fees. Biomassive uses some of the energy it generates at its three plants to run the machines it uses to process its agricultural products. Under Biomassive's permit, it can burn its agricultural byproducts and urban wood waste as fuel, but it is not allowed to burn painted or treated wood or non-wood materials.

Biomassive makes more energy than it can use for its own processing needs. It sells the excess energy to a power company for resale to the public. In the late summer, when energy demand is high, the power company needs as much energy as it can get, and will pay a premium price for Biomassive's late summer energy deliveries.

Last summer, energy demands were particularly high. During July and August Biomassive sold its excess energy to the power company at six to eight times normal prices. In order to maximize its energy generation, it ran the boilers at the three California facilities at their maximum permitted load. Biomassive wanted to generate as much energy as possible, not only because of the profit involved, but also to help California avoid any brown out or black out conditions during peak energy demand.

During this time, when Biomassive ran short of available agricultural byproducts to use as fuel, it also accepted deliveries of urban wood waste, primarily construction debris. Sometimes Biomassive would pay for the wood waste; on other occasions, collectors would deliver the urban waste to Biomassive at its plants for free, in lieu of paying a tipping fee to dispose of the wood waste at an appropriately permitted landfill. These deliveries came so frequently that Biomassive did not have enough staff to inspect the loads to ensure they were free of painted woods and plastics.

The state Air Resources Board (ARB) began to receive complaints from residents in the vicinity

of one of the Biomassive facilities in Ripon, California. The citizen complaints generally concerned the emission of a very dark plume from the stack and described black, greasy soot which was deposited on cars, backyard furniture, pet bowls, etc. This soot typically appeared in the mornings.

Dawn Trodden is a resident of Ripon who called ARB several times to complain about the soot which she believed came from the Biomassive facility. Her home is the fourth house on the street leading away from the large, open lot at the Biomassive site. The stack from the plant is approximately 200 yards from the edge of the lot. Ms. Trodden claims that last summer she saw a black plume coming from the facility on numerous occasions. In addition, she saw trucks entering the facility 24-7. The trucks were quite noisy, and she saw trucks with uncovered loads, including plastics and painted wood, with dust blowing off of the loads and from the roads as the trucks arrived.

As a retired police officer, she thinks that Biomassive is breaking some pollution law, and that does not sit well with her, even if there is an energy problem. In addition to making complaints to the ARB, Ms. Trodden has several times confronted company officials from Biomassive about the soot on her car and yard furniture. Twice last summer, Biomassive's press officer offered to pay to have her car washed, although he has not repeated the offer, since he learned she was also complaining to the ARB.

As a result of Ms. Trodden's complaints, the ARB conducted a surprise inspection of Biomassive's Ripon facility. During the inspection, there were no violations noted. Biomassive was burning agricultural byproducts, the emissions were within permit limits, and company officials stressed that they were in full compliance with all governmental requirements. One inspector, however, noted in the inspection report that "the employees seemed nervous."

Three days after the inspection, Biomassive officials learned for the first time that several employees had been tampering with emissions monitoring equipment at the Ripon facility to cause it to display and print a reading within permit limits although the actual emissions data showed a permit violation. One employee said that he was concerned that he would lose his job if he did not keep the facility operating within permit limits, but it was impossible to do so when the plant was burning urban wood waste instead of agricultural byproducts. In a meeting with the company president and vice-president, he claimed that he had told his supervisor that the urban waste was causing a problem with the boilers, but that his supervisor had told him to shut up and do his job.

After the employees' confession, Biomassive conducted an immediate internal audit, interviewing all of its employees about the tampering with emissions monitoring equipment. As a result of its audit, Biomassive officials learned that employees had been tampering with emissions monitoring equipment at all three of its facilities. Within 48 hours of the confession, Biomassive contacted ARB and disclosed the tampering; it thought that its self-disclosure of the tampering to the regulators would mitigate or avoid altogether any repercussions from that conduct. See generally CAL/EPA Recommended Guidance on Incentives for Voluntary

Disclosure http://www.calepa.ca.gov/Enforcement/Policy/VolDisclosure.pdf.

Biomassive also immediately contacted local air pollution control officials in districts in each of the three facilities located in California. In dealing with its occasional violations in the past Biomassive would resolve the violation through negotiation of a small fine paid to the local air pollution control district. Biomassive resolved the tampering violations with each of the three local air districts in the same way, paying fines ranging from $25,000 to $40,000. Each of these settlements contained a non-admission provision with respect to any liability by Biomassive. At the time these settlements were reached, the local air districts were aware that the ARB was conducting a broad investigation of Biomassive's operations. Biomassive also fired several of the employees believed to be the ones who knew of and encouraged the tampering.

Since last summer Biomassive has spent approximately $20 million upgrading the equipment at its Ripon facility. With more modern, clean-burning equipment, the plant can now generate more energy without risk of violating its permit conditions. Having disclosed the tampering, fired the employees, upgraded its equipment, and paid fines to the local air districts, Biomassive officials believed their legal troubles were over.

Dawn Trodden was disgusted when she read in the paper that Biomassive had paid what she considered ridiculously small fines to the local air districts. She decided to pursue legal action against the company and hired a local lawyer to represent her and other neighborhood residents in a citizen suit against Biomassive.

At the same time, the ARB concluded that Biomassive's behavior warranted far greater financial consequences to the company than the fines to the local air districts. ARB ran a profit model and believes the company generated from $17 to $24 million in additional profits by selling excess energy to the power company last summer, and that it did so in violation of air pollution laws. ARB believes the company should forfeit the excess profits.

Round 1 - Trodden, et al. v. Biomassive

Trodden and her neighbors scraped up enough cash to retain lawyers to sue Biomassive and signed an agreement waiving any potential conflicts of interest presented by collective representation by the same lawyers. There are about 40 houses in the neighborhood near the Biomassive facility. The lawyers sent Biomassive a 60-day notice of intent to sue letter under the Clean Air Act. See 42 U.S.C. § 7604, subd. (b); http://www.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00007604----000-.html. The 60 days are about to expire, and the neighbors are prepared to file suit against Biomassive. Biomassive's lawyers hope to avoid the negative publicity of a citizen suit, and have requested an early settlement meeting.

The neighbors contend that Biomassive's plant has violated its permit and the Clean Air Act, and it is a public nuisance under California state law. See 42 U.S.C. § 7604, subds. (a)(1), (f); Cal. Civ. Code, §§ 3490-3495; *Venuto v. Owens-Corning Fiberglass Corp.* (1971) 22 Cal.App.3d

116.

Civil Code section 3479 provides: “Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.'”

Civil Code section 3480 provides: '”A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.”

Civil Code section 3482 provides: “Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.”

California Jury Instructions, CACI No. 2020, Public Nuisance - Essential Factual Elements, reads as follows:

[Name of plaintiff] claims that [he/she] suffered harm because [name of defendant] created a nuisance. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] created a condition that [insert one or more of the following:] [was harmful to health;] [or] [was indecent or offensive to the senses;] [or] [was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or] [unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;]

2. That the condition affected a substantial number of people at the same time;

3. That an ordinary person would be reasonably annoyed or disturbed by the condition;

4. That the seriousness of the harm outweighs the social utility of [name of defendant]’s conduct;

5. That [name of plaintiff] did not consent to [name of defendant]’s conduct;

6. That [name of plaintiff] suffered harm that was different from the type of harm suffered by the general public; and

7. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]'s harm.

One of the neighbors, Floyd Hawken, has just been diagnosed with kidney disease. His doctor

believes that the rare type of kidney disease Hawken has could only be contracted from breathing pollutants from the plant. The neighbors want compensation not only for the sooty deposits on their property, but also for the air pollution and the emissions they have been breathing from living near the facility in Ripon. They want Biomassive to implement measures to ensure the soot and permit violations will stop. They are willing to agree that penalties may be diverted to projects towards this end. See 42 U.S.C. § 7604, subd. (g). In court, they will seek an injunction requiring Biomassive to operate at all times within its permit limits, cease burning urban waste, and install state-of-the-art pollution control equipment to prevent sooty deposits on their property at any time in the future.

Both parties are aware that Biomassive's Ripon facility upgrades may weaken the citizens' Clean Air Act claim if the citizens cannot show a continuing permit violation. *Gwaltney of Smithfield, Ltd. v. Chesepeake Bay Found.*, 484 U.S. 49, 57 (1987) [to obtain Clean Water Act relief citizens must allege continuing violation; Clean Water Act provisions mirror Clean Air Act provisions], *Satterfield v. J.M. Huber Corp.*, 888 F.Supp. 1561, 1563-1565 (N.D. Ga. 1994) [to obtain CAA relief citizens must allege continuing violation]; but see *Freid v. Sungard Recovery Services*, 916 F.Supp. 465, 467 (E.D. Pa. 1996) [1990 Clean Air Act amendments "overruled *Gwaltney* with respect to wholly past violations"]; see generally 158 A.L.R. Fed. 519 [compiling cases].

Biomassive was shocked to learn of the imminent citizen suit. Its officials believed that they had resolved the issues arising from the tampering. Moreover, Biomassive does not think that the sooty deposits on the neighbors' property came from its facility. Instead, Biomassive thinks those deposits came from the neighbors' own fireplace chimneys.

Biomassive has already retained an expert witness doctor to review Floyd Hawken's claims that emissions from its facility caused his kidney damage. Biomassive's expert has prepared a report stating that Hawken's kidney damage could not have possibly been caused by emissions from Biomassive's facility, and in particular, would not have been caused by exposure to the several months of excess emissions during the summer. The report indicates Hawken likely has had the kidney disease for many years.

Biomassive suspects that Trodden and her neighbors are not very well funded. If Biomassive is not able to reach a settlement with the citizens, it knows that it can afford to entrench in legal proceedings for several years, and likely outlast the citizens. On the other hand, Trodden, Hawken, and their lawyers know that the ARB is investigating Biomassive as a result of the tampering disclosure, and they will be able to use any evidence uncovered in the ARB investigation. Biomassive is also aware of this possibility. Both parties are also aware that if the ARB files its suit, the citizens will not be able to seek any penalties under the Clean Air Act, but they could still pursue their public nuisance claim. See 42 U.S.C. § 7604, subd. (b)(1). In addition, to avoid negative publicity, Biomassive hopes to settle with the citizens before suit is filed.

One area where Biomassive believes the citizens group is off base is the urban waste. It believes

that if urban waste is blended with enough agricultural products, it can burn that kind of waste while remaining within permit limits. It also believes strongly that when it does this, it provides a service to the community by disposing of waste that would otherwise take up space and rot in a landfill, and where the emissions from that decomposing wood would contribute to formation of greenhouse gases. See G. Morris, *The Value of the Benefits of U.S. Biomass Power* (NREL Nov. 1999), pp. iii-iv, 2-13 http://www.nrel.gov/docs/fy00osti/27541.pdf; R. Williams, *Environmental Issues for Biomass Development in California* (Cal. Biomass Collaborative Dec. 2005), pp. 21-28; Micales & Scog, *The Decomposition of Forest Products in Landfills*, International Biodeterioration and Biodegredation, v. 39, no. 2 (1997), abstract at http://www.ingentaconnect.com/content/els/09648305/1997/00000039/00000002/art83389.

Although Biomassive has requested the early settlement meeting, it will not make an opening offer. The neighbors will have to make the first demand. In order to settle, the parties should come to agreement on the terms of any settlement payment to the citizens, the payment if any to Hawken for his kidney injury, and the terms of any mitigation projects and/or injunctive relief.

Round 2 - ARB v. Biomassive

Separately, the ARB has conducted a complete investigation of all three of Biomassive's California facilities, interviewing all employees and reviewing the raw data from the continuous emissions monitoring systems (CEMS). Biomassive thinks the investigation was a waste of taxpayer resources, as it has already paid fines to the three local air districts. Nevertheless, Biomassive cooperated with the investigation, believing that its full disclosure of the tampering by the employees, coupled with its firing of the employees involved, will mitigate its obligations to the state, if any.

Biomassive contends that in the settlements reached with the local air districts, it obtained complete releases of liability for the alleged violations at each of its facilities. If the ARB files suit, it will argue that these settlements preempt the state's lawsuit entirely. ARB strongly disagrees that the local settlements impact the state's police power to prosecute the matter separately and believes these agreements are void because they violate public policy. See Cal. Civ. Code, §§ 1667-1668 (defining contracts that are against public policy), *Stewart v. Preston Pipeline, Inc.*, 36 Cal.Rptr.3d 901, 918 (2005) [settlement agreements are contracts], *Rosen v. State Farm General Ins. Co.*, 30 Cal.4th 1070 (2003) (conc. opn. of Moreno, J.) [courts look to Restatement factors to analyze whether a contract is against public policy], Rest.2d Contracts, § 178; but see *Stephens v. Southern Pacific Co.*, 109 Cal. 86, 89-90 (1895) [**"**unless it is entirely plain that a contract is violative of sound public policy, a court will never so declare."].

In any event, ARB is convinced that its initial investigation of the Biomassive facility in Ripon, several days before Biomassive's self-disclosure, was the catalyst that led to all the additional information coming out about Biomassive's violations.

In its investigation, ARB was able to decipher the CEMS data to show how many days of

tampering occurred at each facility. The data show that during July and August of last year, tampering occurred on at least 77% of the days. As a result, Biomassive potentially had hundreds of hourly violations of its permit limits that were concealed by the tampering. Additionally, through employee interviews, ARB identified at least one former employee at the Ripon facility who will testify that supervisors routinely told employees to tamper with the emissions monitoring equipment. This employee will also testify that he sent email to upper management at Biomassive's headquarters about the tampering several times, although he has no record of that. Finally, he will also testify that employees were told to "really crank it up at night" when neighbors could not see the emissions from the plant's smoke stack. He will testify that Biomassive burned mostly urban waste between 10 p.m. and 4 a.m.

Biomassive is not surprised about this particular employee's statements, because the company terminated him last year after conducting its internal audit. Biomassive contends his statements are retaliatory.

ARB believes Biomassive's disclosure of the tampering and its early, low-dollar settlements with the local air districts were all part of a calculated effort to head off a large penalty by ARB. It wants a full accounting of Biomassive's profits last summer, and a forfeiture of those profits, in addition to a large penalty to deter similar conduct. ARB also wants injunctive relief requiring Biomassive to operate within its permit limits, install realtime emissions monitoring equipment that will broadcast Biomassive's emissions on the internet, and stop burning urban waste.

ARB is also aware that Biomassive is capable of litigating this matter for years. ARB believes that the risk is small that a court would find that the settlements with the local air districts are a complete bar to the ARB's suit. Nevertheless, even though the risk is small, if that were to occur, the downside would be enormous. Under the circumstances, the ARB is willing to entertain settlement negotiations with Biomassive.

Biomassive thinks it has many strong defenses to the ARB's proposed suit. But to avoid the inevitable millions of dollars in litigation costs it would incur defending itself, it is willing to meet to discuss ways to resolve the dispute. Moreover, Biomassive is particularly willing to settle with the ARB if a significant portion of the settlement proceeds can be put toward one or more supplemental environmental projects (SEPs). See CAL/EPA Recommended Guidance on Supplemental Environmental Projects, www.calepa.ca.gov/Enforcement/Policy/SEPGuide.pdf. For example, Biomassive might be willing to upgrade more of its equipment. ARB, on the other hand, will want SEPs that are not connected to Biomassive's business operation. For example, ARB thinks Biomassive should donate some of its massive land holdings for a wildlife preserve,

or enter into agreements to collect in-forest residues (e.g. logging slash) on land it does not own and burn the residues in its boilers to help prevent pollution-forming forest fires.

Biomassive will make the opening offer.